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No. 08-1447

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ST. JOHN'S UNITED CHURCH OF CHRIST, HELEN RUNGE, and SHIRLEY STEELE,

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION, and RANDY BABBITT, Administrator, and CITY OF CHICAGO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I. *EVANS* AND *FRANKLIN* CLEARLY ESTABLISH REDRESSABILITY.

Much of Respondents' argument centers on the contention that neither Congress nor FAA has authority to condition federally authorized financial assistance to a non-federal recipient on the recipient taking actions to protect interests which Congress wants protected. Building on that erroneous premise, Respondents argue that *Utah v. Evans*, 536 U.S. 452, 463-64 (2002), and *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992), do not

apply because FAA cannot condition federal authorization of $1.282 billion in PFCs on a requirement that Chicago preserve St. Johannes religious cemetery.

Under Respondents' construct, since there is no constitutional authority for Congress (and the FAA) to condition federally authorized funding on a requirement that Chicago protect St. Johannes: FAA is free to ignore federal RFRA; Chicago is free to destroy St. Johannes; and Chicago is free to spend the $1.282 billion without any judicial enforcement of FAA's RFRA obligations.

Respondents are wrong. Under its spending power Congress can empower federal agencies to attach conditions to funding assistance, requiring the non-federal recipient to take action to protect valued resources. *See: New York v. United States*, 505 U.S. 144, 167 (1992).

Consistent with Congress's delegation, FAA has adopted regulations which impose "mitigation" requirements that the non-federal airport operator must fulfill, to protect environmental and other resources:

> Grants, permits, or other approvals ... shall include conditions described in the EIS that require implementation of mitigation adopted by the agency in making its decision...

FAA Order 1050.1E *Environmental Impacts Policies and Procedures,* par. 500a(2) (emphasis added).

FAA bases such mitigation requirements on "special purpose laws":

> Examples of these laws or directives include, but are not limited to actions involving: section 404 of the Clean Water Act; section 4(f) of the DOT Act; section 106 of the National Historic Preservation Act; Marine Mammal Protection Act, section 7 of the Endangered Species Act; section 307 of the Coastal Zone Management Act; and executive orders.

FAA Order 1050.1E *Environmental Impacts Policies and Procedures*, par. 404f, p. 4-7.

These mitigation requirements apply to both FAA grants and PFC authorizations.[1]

FAA has imposed such "mitigation" requirements on Chicago as a condition of funding, including protection of historical resources and a commitment to preserve Rest Haven, another religious cemetery:

> ...FAA will take appropriate steps, as described in this ROD, through Federal funding grant assurances and conditions, and airport layout plan approvals, to ensure that the following mitigation measures, and other impact reduction measures as described herein, are implemented for the selected alternative. * * * The primary

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[1] Respondents claim that the $1.282 billion in PFCs are "private funds" immune from requirements of federal law. To the contrary, FAA regulations make clear that authorization of PFCs is a federal action. (JA-1793). Thus, FAA must comply with NEPA and numerous other federal protective laws when it makes PFC decisions.

> responsibility for implementation of the mitigation measures lies with the City of Chicago. The FAA will have oversight responsibility and conditions this approval upon implementation of that mitigation.

September 2005 FAA Record of Decision for O'Hare Modernization ("ROD"), p. 44 (JA-4781) (emphasis added); *see also*, ROD Ch. 9; and, ROD Appendix B (JA-4781, JA-5217).

Chicago has explicitly agreed to comply with the conditions and limitations imposed by FAA:

> Mitigation measures for those impact categories where mitigation measures are necessary to avoid or minimize significant environmental impacts, for which the City of Chicago has agreed to implement, as well as identified or adopted monitoring and enforcement programs, are summarized below.

ROD, p. 44 (JA-4781) (emphasis added).

There is no reason to believe that Chicago would ignore protective requirements imposed by FAA. Chicago knowingly and voluntarily accepted the requirements that FAA imposed in furtherance of these "special purpose" laws, as well as the RFRA-based requirement that Chicago protect Rest Haven Cemetery. *See*: *Pennhurst State School & Hospital v. Halderman,* 451 U.S. 1, 17 (1981) ("The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"); *Bennett v. Kentucky Department of Education*, 470 U.S. 656, 665-66 (1985).

FAA has imposed "mitigation" requirements across the board for all funding actions dealing with the OMP. These are then incorporated separately in the decision document for each grant decision, and also in the PFC decision.

Like the requirement to protect Rest Haven Cemetery, an FAA requirement that Chicago preserve St. Johannes Cemetery would be a condition as well on the future billions of dollars of federally authorized funding Chicago says it needs for the OMP.

Under these facts, the *Evans-Franklin* authority clearly establishes redressability.

There is every reason to believe that rather than foregoing federally approved funding, Chicago would find a way to preserve St. Johannes.

Of course, under the spending clause, Chicago is free to refuse federally authorized financial assistance. But if Chicago does make such a decision, it cannot then take the $1.282 billion in PFC funds and spend it in disregard of requirements imposed by FAA as conditions on the federal funding authorization. Chicago and FAA cannot have it both ways.

Other courts have addressed a non-federal recipient's threat to walk away from the federal funding assistance. The Seventh Circuit gave the non-federal recipient the option to comply with the federal environmental requirements, or to disavow federal funding and forever be barred from receiving federal funds for the project. *Old Town Neighborhood Association, Inc. v. Kauffman*, 333 F.3d 732, 736 (7th Cir. 2003). In other cases, where as here significant federal funds had already been

expended, the non-federal recipient was not allowed to back out of the federal environmental obligation. *Ross v. Federal Highway Administration,* 162 F.3d 1046, 1052-53 (10th Cir. 1998); *Scottsdale Mall v. State of Indiana*, 549 F.2d 484, 489 (7th Cir.1977), *cert. denied,* 434 U.S. 1008 (1978).

II. RESPONDENTS' OTHER ARGUMENTS ARE MERITLESS.

A. Prior Federal RFRA Litigation.

Respondents' suggestion that Petitioners have attempted to abuse the judicial process by multiple filings is disingenuous. The need for separate multiple judicial review proceedings arose from FAA's own insistence: (1) that FAA's decision to approve the ALP was separate and apart from FAA's funding decisions; and (2) that each funding action by FAA is a separate administrative action. FAA has stated:

> ...[T]he PFC and AIP processes are separate and distinct from the NEPA process.

FAA comments in Final EIS (JA-2987, 3050, 3626).

> The decisions to approve AIP and PFC funding are completed in separate processes.

ROD, p. 9 (JA-4742) (emphasis added). Moreover, because FAA made each funding decision on a different date, Petitioners were compelled to file separate petitions for seeking judicial review under the time limitations of 49 U.S.C. §46110(a).

But in fact, Petitioners sought consolidation of related funding proceedings so that the Circuit

Court could address FAA's RFRA obligations comprehensively.

In *Village of Bensenville v. FAA*, 457 F.3d 52 (D.C. Cir. 2006) (App. 15a), the Circuit Court held that there was no subject matter jurisdiction pursuant to 49 U.S.C. §46110(a) to challenge the FAA's funding Letter of Intent because the LOI was not a final order.

Following *Bensenville*, FAA made three serial funding decisions which required three separate petitions for review: (1) an LOI grant of $29.3 million; (2) the PFC authorization of $1.282 billion; and (3) a second LOI grant of $28.4 million. All of these funds will be used for the same "Phase 1 Airfield" project that will destroy St. Johannes.

Respondents successfully blocked consolidation. By limiting the Circuit Court scrutiny in No. 06-1386 to the first $29.3 million LOI grant, FAA was able to successfully argue that because this grant portion was for a segment of the Phase 1 Airfield which did not physically impact the cemetery, Petitioners had not satisfied the standing causation requirement.

The Circuit Court rejected Petitioners' request to consolidate the $29.3 LOI petition with the $1.282 billion PFC petition, emphasizing that the PFC petition (pending before the Court) was not before the Court in No. 06-1386. Pet. App. 66a ("Nor is the $1.3 billion in PFC's before the court").

Given the Circuit Court's refusal to consolidate review proceedings as to the first LOI grant with the $1.282 billion PFC proceeding, the Court's decision as to the second LOI grant ($28.4 million) was pre-ordained. The Court again ignored the

pending petition challenging the $1.282 billion PFC decision for the same Phase 1 project, and again ruled that Petitioners had not satisfied the standing causation requirement. *St. John's United Church of Christ v. FAA*, No. 07-1435 (D.C. Cir. July 14, 2008) (*per curiam*) (Chicago App. 2a).

B. Respondents' Segmentation Argument Is Meritless.

Reversing its prior segmentation argument, FAA acknowledged in its PFC decision that it is wrong to consider pieces of OMP as isolated segments, to avoid comprehensive consideration of the entire OMP:

> ...[P]rudent environmental analysis calls for a review of the development program on a cumulative basis, rather than a piecemeal review of the development associated with each construction phase. * * * Furthermore, given that each phase is a part of, and makes up, the whole of the development program being studied, it is reasonable to state that the environmental impacts of each phase are included in the environmental impacts of the whole...

FAA FAD on $1.282 billion PFC authorization, p. 43 (JA-9580).

Thus, FAA's and Chicago's continued attempt to split the funding into smaller segments – *i.e.*, by arguing that the hundreds of millions in PFCs spent on construction of Runway 10C/28C (the runway that will destroy St. Johannes) are not at issue because local funds will be used for the actual destruction of the cemetery – is without merit.

Given that FAA now concedes that the components of OMP (and Phase 1) should not be viewed in isolation, it is clear that the standing causation requirement is satisfied. FAA's $1.282 billion PFC authorization plainly is a "substantial factor" in constructing Phase 1 and the related destruction of St. Johannes. *Tozzi v.* U.S. *Dept. of Health and Human Services*, 271 F.3d 301, 308 (D.C. Cir. 2001); *National Parks Conservation Association v. Manson*, 414 F.3d 1, 5 (D.C. Cir. 2005).[2]

C. "State Action" And The Spending Power.

Respondents' attempt to apply the "state action" reasoning of *Village of Bensenville v. FAA, supra* (on FAA's approval of the ALP), to FAA's authorization of $1.282 billion in PFCs is without merit.

The *Village of Bensenville* discussion as to FAA funding and RFRA compliance was pure *dicta*. Because the Circuit Court had ruled that there was no jurisdiction to review the FAA LOI funding action – due to the absence of a final order required for 49 U.S.C. §46110(a) jurisdiction – there was no FAA funding decision before the Court. Petitioners know of no other case law supporting a "state

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[2] The three D.C. Circuit rulings of no subject matter jurisdiction for funding challenges in the prior cases do not create *res judicata*. A dismissal for lack of subject matter jurisdiction is no bar to a later action. *See*: Wright & Miller, Federal Practice & Procedure ¶4436. This is especially apparent here, where the $1.282 billion PFC authorization was not even before the Court in the earlier proceedings.

action" requirement for judicial enforcement of statutory responsibilities against a federal agency, where Congress has imposed such obligations on the agency under the spending power.

Nevertheless, to the extent "state action" could be considered relevant to FAA's authorizing $1.282 billion in PFCs, the law is clear that where a federal agency provides funding to a non-federal entity for specific projects which the agency knows are causing injury to federally protected rights, the federal agency can be held responsible.

Respondents argue that a federal agency can provide billions of dollars in federally authorized funding assistance to construct the OMP without the agency being required to comply with RFRA because there was no "state action," under cases such as *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); and *Blum v. Yaretsky*, 457 U.S. 991, 996-98 (1982).

However, in *Blum* and *Rendell-Baker*, the state funding was program-wide. These cases did not involve a state decision approving specific funding for the particular action being challenged. By contrast, here FAA has made a funding decision for a specific project that calls for the destruction of St. Johannes.

A more relevant case is *Gautreaux v. Romney*, 448 F.2d 731, 737-38 (7th Cir. 1971). The Seventh Circuit's finding there – that HUD's funding of Chicago's segregated housing projects created independent constitutional and statutory liability on the federal agency for assisting the non-federal actor – was discussed with approval by this Court in *Hills v. Gautreaux*, 425 U.S. 284 (1976):

> The United States Court of Appeals for the Seventh Circuit reversed and ordered the District Court to enter summary judgment for the respondents, holding that HUD had violated both the Fifth Amendment and §601 of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. §2000d, by knowingly sanctioning and assisting CHA's racially discriminatory public housing program.

Hills v. Gautreaux, 425 U.S. at 289 (emphasis added).

Gautreaux v. Romney was also cited with approval in *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 749-50 (D.C. Cir. 1990). There, while rejecting an across-the-board challenge to an entire agency funding program, the Circuit Court acknowledged that a federal agency could be held liable for funding a particular project that injured federally protected rights.

Finally, there is nothing in *City of Boerne v. Flores*, 521 U.S. 507 (1997), which prevents FAA from requiring protection of religious rights, as it has for environmental rights. *Boerne* deals with constitutional limitations on congressional power under section 5 of the Fourteenth Amendment. *Boerne* does not prevent the Congress from requiring recipients of federally authorized funding assistance to comply with conditions to protect resources of federal concern, under its spending power.

D. There Has Been No RFRA Strict Scrutiny Determination.

Respondents next argue that even if this Court were to find standing, Petitioners would lose on the merits of a RFRA claim because: (a) FAA conducted a proper strict scrutiny analysis; and (b) the Seventh Circuit applied the strict scrutiny test in addressing Petitioners' First Amendment challenge in a separate case.[3]

Petitioners take no issue with FAA/Chicago's generalized identification of the involved governmental interests: (1) reducing congestion-delay; and (2) increasing capacity. Chicago Br. p. 26; FAA Br. p. 20.

But neither the FAA nor the Seventh Circuit conducted the proper strict scrutiny analysis required under this Court's decisions in *Wisconsin v. Yoder*, 406 U.S. 205 (1972); and *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

Yoder and *Gonzales* both prohibit government agencies from relying on generalized (albeit legitimate) claims of governmental interest. Instead, government must make a particularized demonstration of an incremental difference between pursuing the government's desired action and pursuing a non-destructive alternative that

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[3] *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616 (7th Cir. 2007), *cert. denied*, 128 S.Ct. 2431 (2008).

rises to the level of a "compelling governmental interest."

The FAA conducted computer modeling studies of three alternatives (and one computer modeling study of the existing O'Hare). All of the alternatives modeled called for destruction of St. Johannes. FAA never performed any computer modeling of non-destructive added runway alternatives – not even merely moving or shortening a runway a few hundred feet – to calculate what level of delay reduction and capacity increase would thus be achieved.[4]

Thus, FAA had no way of knowing whether the incremental difference in aviation performance (*i.e.*, delay reduction and capacity increase) between FAA's Preferred Alternative and any non-destructive alternatives is 1%, 10%, 20% or 50%. Without this information, FAA had no way of concluding that the incremental difference in aviation performance between FAA's Preferred Alternative and any new runway alternatives which would not destroy St. Johannes rises to the level of a "compelling governmental interest." Consequently there is no basis for Respondents' claim that the FAA satisfied the strict scrutiny test.

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[4] Contrary to Chicago's suggestion that any non-destructive alternatives were unsafe, FAA concedes that several of the non-destructive alternatives (developed by former senior FAA air traffic experts) "were determined to be capable of being implemented and operated safely." FAA FAD, PFC No. 62, p. 69 (JA-9606) (emphasis added).

Nor does the *dicta* in Judge Wood's Seventh Circuit opinion satisfy the incremental strict scrutiny analysis required by *Yoder* and *Gonzales.* Judge Wood's excursion into strict scrutiny was done without a trial record. Despite numerous disputed issues of fact, Judge Wood ignored (over the objections of the dissenting judge) the issues of fact presented by the pleadings and simply based her conclusory statements on her reading of portions of the flawed assertions of the FAA.

Judge Wood never conducted the incremental analysis required by *Yoder* and *Gonzales.* Thus, Judge Wood had no basis for concluding whether the incremental difference between FAA/Chicago's Preferred Alternative and any of the non-destructive new runway alternatives, in the amount of delay reduction and capacity increase, rose to the level of a compelling governmental interest to justify the destruction of St. Johannes Cemetery.

CONCLUSION

For over 150 years St. John's has tenaciously guarded its "exercise of religion," holding to a fundamental belief that St. Johannes' consecrated graves must remain undisturbed until Judgment Day.

This Court in *Gonzales* told the nation's religious community that RFRA meant what it said and that courts had a constitutional obligation to enforce RFRA's protection.

There is time and space for RFRA compliance. The major O'Hare airlines have questioned the aviation need to go forward with the remainder of

the OMP. November 8, 2008, *Chicago Tribune.* "Airlines: Stop O'Hare Expansion." Of the $14.29 billion cost for OMP, less than 25% has been expended.

For the reasons stated in the petition and this reply, the petition for certiorari should be granted.

Respectfully submitted,

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